

# **Exhibit "5"**

1 IN THE UNITED STATES DISTRICT COURT FOR THE  
2 DISTRICT OF HAWAII

3 'ILIO'ULAOKALANI COALITION, ) CIVIL NO. 04-00502DAE  
4 a Hawaii nonprofit )  
5 corporation; NA 'IMI PONO, a )  
6 Hawaii unincorporated )  
7 association; and KIPUKA, a )  
8 Hawaii unincorporated )  
9 association, )  
10 Plaintiffs, ) Honolulu, Hawaii  
11 vs. ) December 18, 2006  
12 ) 9:51 a.m.  
13 DONALD H. RUMSFELD, Secretary ) ORAL ARGUMENT  
14 of Defense; and Les Brownlee, )  
15 Acting Secretary of the U.S. )  
16 Department of the Army, )  
17 Defendants. )  
18 )  
19 )  
20 )  
21 )

12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE DAVID ALAN EZRA,  
14 UNITED STATES DISTRICT JUDGE

## 14 APPEARANCES:

15 For the Plaintiffs: DAVID L. HENKIN, Esq.  
16 Earthjustice  
223 South King Street, Suite 400  
Honolulu, Hawaii 96813

18 For the Defendants: HARRY YEE, Esq.  
19 Assistant U.S. Attorney  
20 Office of the U.S. Attorney  
PJJK Federal Building  
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Honolulu, Hawaii 96850



1                   "Answer: No."

2                   Your Honor, we had no knowledge that we were going to  
3 receive anything other than the deposition we had already  
4 received. We did in fact receive a declaration and we  
5 responded with rebuttal testimony immediately upon receiving  
6 it.

7                   MR. HENKIN: Your Honor, I think that there's -- was  
8 never a question in defendant's mind. Mr. Hood is not a career  
9 witness --

10                  THE COURT: All right. Okay. Well, we can -- we can  
11 play tennis here with each of you going back and forth all  
12 morning long --

13                  MR. HENKIN: Yes, Your Honor.

14                  THE COURT: -- as to each of your respective versions  
15 of what is and what is not your view of the record, but it will  
16 get us absolutely nowhere.

17                  You can be seated.

18                  Part of the problem, of course, is that because of the  
19 -- the manner in which the matter was remanded to me with what  
20 I would call an extremely short fuse from the Ninth Circuit, in  
21 addition to which the government, for I think legitimate  
22 reasons, is also interested in expediting this matter, I have  
23 had to put this case on an extremely fast track. And therefore  
24 what we are doing here is we're ending up attempting to build  
25 what will be a significant and already is a significant record

1 in a relatively short time. We're doing essentially 6 months  
2 or a year's worth of record building here in a matter of weeks.  
3 And of course that's what causes these types of disagreements.

4 Normally we would resolve these disagreements by  
5 simply referring the matter down to the magistrate, the  
6 magistrate would take the matter under advisement, you'd have a  
7 hearing, somebody would be allowed to take a follow-up  
8 deposition and all of that would happen in the normal course  
9 and it would take place over a period of weeks or months. We  
10 don't have that kind of time obviously.

11 Now, my interest here is to make sure that I am as  
12 well informed about the facts and the arguments as possible. I  
13 also have an obligation to make sure that the record is clear  
14 and complete so that when this matter is reviewed on appeal, as  
15 we all know it will be, both at the Ninth Circuit level and  
16 possibly en banc and possibly even by the Supreme Court, that  
17 there is a solid record, and that we don't have the appellate  
18 court trying to divine out of outer space what I made my  
19 decision on or what the arguments were by the parties.

20 I mean as you -- as both of you know I sit on the  
21 Court of Appeals by designation on a regular basis. So I am  
22 quite aware of what the requirements are in order to have a  
23 complete and accurate appellate record. And I'm trying to  
24 build that record here. So it isn't just for me. It's also so  
25 that we can have a more accurate record on appeal. Because we

1 already know there is significant disagreement about the  
2 disposition of this matter in the Ninth Circuit. So it's  
3 important that this go up as accurately as it can.

4 And that's why when both sides, quite frankly -- and  
5 by the way, your motion to file an overextended brief is  
6 granted. The defense has come to me and plaintiff has come to  
7 me and asked for extensions, we had a number of extensions  
8 on -- late last week to some of the earlier deadlines, we had  
9 requests for oversized filings. I've granted every one of  
10 those requests because of the importance of making sure that we  
11 have an adequate and appropriate foundation here.

12 I am not of a mind that any party who has a legitimate  
13 witness to provide to the court should be denied that  
14 opportunity. So I am not going to grant your request to strike  
15 that witness' affidavit.

16 However, as much as I am reluctant to do so, I am  
17 going to allow you to supplement the record after the hearing  
18 by providing you an opportunity to take his deposition on just  
19 the issues which are contained within his declaration. And  
20 I'll allow you to file a short memorandum addressing those  
21 issues and I'll allow the government to do the same.

22 Now, I'm not interested in this delaying in any  
23 significant way my resolution of my portion of this case. This  
24 gentleman I understand is available?

25 MR. GETTE: I don't know. He is here, Your Honor, and

1 THE COURT: See, here we go again.

2 MR. HENKIN: Exactly, Your Honor.

3 THE COURT: Right back in the, you know, same spot we  
4 were before, you know.

5 MR. GETTE: Your Honor, if you're asking --

6 THE COURT: I don't know how many supplement -- I mean  
7 not an hour goes by that I don't have somebody knocking at the  
8 door with a supplemental memorandum of some sort or other in  
9 this case.

10 Very, very difficult for me, you know, in the parlance  
11 of my old days in the service myself, we got a moving target  
12 here and I'm having a hard time sighting in on it. And I need  
13 to do that in order to render a judgment in this case because  
14 the landscape keeps shifting. Somebody submits something, then  
15 somebody else wants an opportunity to rebut it and then  
16 somebody says well, they've submitted a rebuttal, they've added  
17 something new and now we need an opportunity to rebut it.

18 I'll tell you what. We are going to close this record  
19 tomorrow afternoon at 4 o'clock. You have this afternoon to  
20 look at what they've submitted and you each have by tomorrow  
21 afternoon at 4 o'clock to submit a no more than 20-page  
22 memorandum addressing the issues. I don't want any further or  
23 additional declarations other than the one that Mr. Henkin is  
24 going to submit in response to the declaration of, I believe  
25 it's Mr. Kawasaki?